Supreme Court, U.S.
FILED

97 • 398 SEP - 3 1997

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No. _____

In The
Supreme Court Of The United States
October Term, 1996

BEVERLY R. FORGIONE
Petitioner

v.

COMMERCIAL CREDIT CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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26 pp

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED FOR REVIEW

IS THE APPLICATION OF CONNECTICUT RULES OF APPELLATE PROCEDURE, §4056 TO THE FACTS OF THIS CASE REPUGNANT TO THE PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSITUTION SINCE IT PERMITS DISMISSAL WITHOUT AFFORDING PETITIONER AN OPPORTUNITY TO BE HEARD AT A MEANINGFUL TIME AND MEANINGFUL MANNER ON HER COUNTERCLAIM AND SPECIAL DEFENSES PRIOR TO BEING DEPRIVED OF TITLE AND POSSESSION OF HER HOME THROUGH FORECLOSURE.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

BEVERLY R. FORGIONE
PETITIONER,

V.

COMMERCIAL CREDIT CORPORATION

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The petitioner Beverly Forgione respectfully prays that a writ of certiorari issue to review a decision of the Connecticut Supreme Court entered on June 5, 1997 denying review of a Connecticut Appellate Court's decision to dismiss dated April 24, 1997.

OPINION BELOW

The opinion of the Connecticut Supreme Court is printed in Appendix A, infra, page 1A. The opinion of the Connecticut Appellate court is printed in Appendix B, infra, page 2A. The trial court (Celotto, J.) granted judgment of strict foreclosure on December 20, 1996, in the Superior Court, Judicial District of New Haven at New Haven, CV 91 0317554S.

JURISDICTION

The opinion of the Appellate Court of the State of Connecticut was entered on April 24, 1997 and the opinion of the Supreme Court of the State of Connecticut, Appendix A, infra, page 1A, denying certiorari was entered on June 5, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, §1

The Connecticut Practice Book, Rules of Appellate Procedure are as follows:

Connecticut Rule of Appellate Procedure, §4056
Connecticut Rule of Appellate Procedure, §4184B
Connecticut Rule of Appellate Procedure, §4106

STATEMENT OF CASE

The Respondent, Commercial Credit Corporation (hereinafter "CCC") is the owner and holder of petitioner Beverly Forgione's (hereinafter "Forgione") first and second mortgage.

CCC'S FIRST STRATEGY IS TO DEFEAT BANKRUPTCY CHAPTER 13 PETITION

On June 3, 1991 Forgione filed a voluntary Chapter 13 petition in the United State Bankruptcy Court, Case No. 91-21808. On March 9, 1992 Forgione's Chapter 13 Plan was confirmed after being amended at the direction of CCC. On January 19, 1993 the Chapter 13 Trustee moved to dismiss. In researching the matter Forgione discovered that during the period of time the bankruptcy stay was in effect had attempted to frustrate the Chapter 13 petition by rewriting Forgione's first mortgage and misapplying funds paid to it under the said Chapter 13 plan. Specifically, among other things CCC unilaterally changed the terms of the loan from a thirty to a 16 year 5 month loan; changed the interest rate from a variable to a fixed rate; failed to apply monies paid by Forgione to the Trustee to the arrearage as set forth in the plan; applied regular monthly payments intended for the first mortgage to the second mortgage and vice versa; and accepted "current payments" under its mortgage which included a dollar amount for taxes and insurance but did not pay said real estate taxes or insurance or reduce or refund Forgione for the monies she paid toward same. The result was that Forgione discovered that the taxes had not been paid and she did not have the funds to pay the real estate taxes in addition to amounts paid under the plan and had to have her bankruptcy Chapter

13 plan voluntarily dismissed on May 14, 1993. On August 4, 1993 CCC commenced a foreclosure of the second mortgage against Forgione in New Haven Superior Court and on November 8, 1993 Forgione filed an Answer, Special Defense and a Five Count Counterclaim asserting claims of breach of contract/violation of the automatic stay while the Chapter 13 Plan had been in effect, fraud, conversion, violation of the federal and state Truth-in-Lending Acts, and a violation of CUTPA with respect to both the first and second mortgages.

CCC'S SECOND STRATEGY IS TO DEFEAT FORGIONE'S DEFENSE ON THE MERITS BY DILATORY PLEADING

On June 9, 1994 seven months after Forgione filed her answer, special defenses and counterclaim CCC commences a strategy of dilatory pleading designed to delay indefinitely a hearing on the merits and to thereby prevent Forgione from ever being heard on her truth-in-lending claims which would result in a recision of CCC's mortgages. Specifically, CCC moved to strike said Special Defenses and Counts One, Two, Three, and Five of the Counterclaim which the court on August 1, 1994 granted so far as same addressed claims relating to the first mortgage not subject of the foreclosure action. Thereafter, on August 12, 1994 Forgione filed an Amended Second Special Defense and Counterclaim in substance the same as those stricken but specifically addressed to the second mortgage only.

On August 19, 1994 CCC moved to strike Forgione's Amended Special Defenses and Counterclaim but never pursued said Motion to Strike, leaving the pleadings open as to said counterclaim. However, on March 17, 1995

seven months later, CCC filed a Request for Leave to Amend its Complaint to add a Second Count seeking to foreclosure the first mortgage.

On March 29, 1995 Forgione filed a Chapter 7 Petition in the United State Bankruptcy Court bearing Case No. 95-2112 and filed an objection to the Request for Leave to Amend in the state court. She thereafter, on May 26, 1995 commenced an adversary proceeding alleging claims against both the first and second mortgages. However, on January 30, 1996 when CCC objected to F. Woodward Lewis,Jr. acting as attorney for the Trustee, Forgione did not object to CCC's Motion to Dismiss being granted without prejudice or to a Motion for Relief from Stay being granted since counsel for Forgione was unable to obtain the malpractice insurance necessary in order to pursue the matter on behalf of the Trustee and no other attorney was available to do so given the complicated nature of the case.

Thereafter, on April 8, 1996 the Superior Court overruled Forgione's Objection to Amended Complaint and on May 15, 1996 CCC purportedly filed a Motion for Default for Failure to Plead against Forgione but did not send a copy to Forgione in accord with the Practice Book and Forgione was unaware same had been filed. Furthermore, the next day, May 16, 1996 CCC filed a withdrawal of the First Count pertaining to the second mortgage on the basis that the dispute had been resolved by "discussion of the parties on their own" although this was not true and to date Forgione still has a counterclaim pending with respect to the First Count/Second Mortgage. Therefore, on June 19, 1996 Forgione filed a Request to Revise asking that the first count be reinstated. CCC objected and on July 29, 1996 the Court sustained CCC's objection.

Thereafter, on August 14, 1996 CCC filed a Motion for Judgment After Default which was prior to August 23, 1996 the date Forgione received notice for the first time from the court that the Motion for Default dated May 15, 1996 had been granted. Immediately, on August 28, 1996 Forgione filed a Motion to Set Aside Default as well as an answer, special defenses, and counterclaim pursuant to CONN. PRAC. BOOK §363A. On October 7, 1996 she received notification from the court of its denial on September 30, 1996 of the Motion to Set Aside Default and on October 18, 1996 filed a Notice of Intent to Appeal and Motion for Reargument which was denied on October 23, 1996. On the same day CCC reclaimed the Motion for Judgment After Default to which Forgione objects on basis default itself had been improperly granted.

On or about December 6, 1996 Forgione received notification that the court had scheduled a hearing on "The Motion for Strict Foreclosure" on December 20, 1996 even though no such motion was filed. Thereafter, on December 17, 1996 Forgione filed a subsequent objection on the basis that the Motion for Judgment was improper because it did not comply with either CONN. PRAC. BOOK §528 nor CONN. PRAC. BOOK §526A.

On December 20, 1996 Forgione appeared to be heard on a Motion for Judgment after Default. The court however, sua sponte went forward as if a Motion for Strict Foreclosure had been filed and thereafter granted the Motion for Strict Foreclosure. Forgione subsequently filed this appeal on January 7, 1996. On February 19, 1996 CCC filed a Motion to Dismiss on the basis the appeal was frivolous and taken solely for delay. Forgione objected to the Motion to Dismiss on March 3, 1997 on the basis that the any delays in the trial court proceedings were the fault

of the plaintiff, and it was the plaintiff who had continuously sought through dilatory pleading to prevent a trial on the merits since Forgione's valid recision of the first mortgage for unilateral amendment from a 30 year to a 16 year 5 month loan would leave no mortgage to foreclose. Despite Forgione's arguments, the Appellate Court issued notice of its decision granting the Motion to Dismiss on April 24, 1997.

On May 13, 1997 Forgione petitioned the Connecticut Supreme Court for certification to appeal from the Appellate Court's dismissal on the basis that application of §4056 to the facts of this case was unconstitutional since it denied the petitioner an opportunity to be heard on the merits of her special defenses and counterclaims prior to being deprived of title and possession of her home through foreclosure.

REASON FOR GRANTING THE WRIT

The petitioner herein respectfully requests that this Court issue a writ of certiorari because the application of §4056 of the Rules of Appellate Procedure is repugnant to U.S. CONST. amend. XIV, §1 since it allows dismissal without benefit of a hearing on the merits of her counterclaim and special defenses at the trial court and appellate court levels, thereby depriving the appellant Beverly Forgione of both her trial court procedural due process rights and the procedural rights afforded to her under the Rules of Appellate Procedure and ultimately deprives her of title and possession to her home through foreclosure despite having made her payments in accord with the mortgage contract and/or the Federal Bankruptcy

Court order.

The petitioner herein has a significant property interest at stake, namely her home which will be lost through foreclosure. The Connecticut Supreme Court as well as this court's decisions have time and time again reflected the Court's acknowledgement that procedural due process must be strictly complied with when deprivation of property rights are at stake. "It is fundamental that property cannot be taken without procedural due process as guaranteed by the fourteenth amendment to the constitution of the United States and Article first, §10 of the Constitution of Connecticut." *Roundhouse Construction Corporation v. Telesco Masons Supplies co.* 168 Conn. 371, 376, 362 A. 2d 778, 781 (1975). "It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 319,. 96 S. Ct. 893. 47 L. Ed. 2d 62 (1965); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed 2d 18 (1976). The United States Supreme Court has reiterated that these fundamental requirements apply to the deprivation of any "significant property interest." *Boddie v. Connecticut*, 410 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113.

The application of the Connecticut Rules of Appellate Procedure to the facts of this case unconstitutionally deprived the petitioner of her due process rights to be heard at meaningful time and in a meaningful manner. The respondent sought dismissal of the petitioner's appeal under §4056 of the Connecticut Rules of Appellate Procedure on the basis that the appeal was frivolous and taken solely for delay.

The plain language of §4056 does not permit the filing of a Motion to Dismiss based upon delay or

frivolousness of the appeal

Connecticut Rule of Appellate Procedure §4056 in pertinent part states:

> Any claim that an appeal or writ of error should be dismissed, whether based on lack of jurisdiction, failure to file papers within the time allowed, or other defect, shall be made by a motion to dismiss the appeal or writ...

Clearly, said section covers jurisdictional issues such as lack of final judgment, mootness, lack of standing, etc. and procedural issues and defects such as timeliness in filing, and inadequate certification to opposing counsel. The "other defect" language" of said section was not designed to address frivolous appeals or appeals taken solely for delay because Connecticut Rule of Appellate Procedure §4184B (which addresses actions subject to sanctions) specifically addresses these issues and before imposition of any sanction under §4184B can be imposed (such as dismissal) a hearing is mandatory. Connecticut Rule of Appellate Procedure, §4184C. Practice Book §4056 on the other hand, does not allow a hearing and to grant a Motion to Dismiss on the basis of the frivolousness of the appeal or that the appeal is taken solely for delay under the guise that this is a "defect" in the appeal itself, deprives the appellant of the rights afforded by the appellate process as well as procedural due process.

Specifically, the Motion to Dismiss herein was filed prior to the date briefs were due. Although Forgione filed a response to the Motion she was limited to 10 pages to

argue in opposition to the plaintiff's claims of frivolousness and delay by arguing the facts and the law supporting her appeal and its issues. Not only did this shift the burden of proving frivolity from CCC to Forgione, (see, *Texaco Inc. v. Golart*, 206 Conn, 454, 464, 538 A. 2d 1017 (1988) the "burden of proof lies in the moving party to establish the frivolity of the appeal.") but this is very limited space given the fact that the Rules of Appellate Procedure give the petitioner an opportunity to argue the facts and law in favor of the issues raised on appeal in a thirty-five page brief and fifteen page reply brief, (Connecticut Rule of Appellate Procedure §4064B) as well as by virtue of oral argument. (Connecticut Rules of Appellate Procedure §4106) To allow dismissal in this manner without benefit of briefing the appellate issues and more importantly without hearing (a right afforded to the appellant in §4184) is not only contrary to the appellate court rules but deprives her of her constitutional right to procedural due process at the trial, Appellate, and Supreme Court levels.

CONCLUSION

Application of Connecticut Rules of Appellate Procedure, §4056 to the facts of this case, is repugnant to U.S. CONST. amend. XIV, §1 since it results in Forgione being deprived not only of the opportunity to be heard at a meaningful time and in a meaningful manner but deprived of being heard <u>at all</u>. She has never had a trial on the merits and has never had an opportunity to present her special defenses and counterclaims either at the Connecticut trial court, Appellate Court, or Supreme Court.

For all the reasons enumerated above, the petitioner Beverly R. Forgione prays this honorable court accept her petition for writ of certiorari.

RESPECTFULLY SUBMITTED,
BEVERLY R. FORGIONE

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APPENDIX

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APPENDIX A

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-96-0370
COMMERCIAL CREDIT CORPORATION
V.
BEVERLY FORGIONE

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court [AC 16777], it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,
s/

ASSISTANT CLERK-APPELLATE

Dated: June 5, 1997
Notice sent: 6/6/97
Clerk, Superior Court, New Haven-CV93 0351035S
Clerk, Appellate court
Reporter of Judicial Decisions
SAO
F. Woodward Lewis, Jr.
Shipman & Goodwin
Elliot Rosenberg
Robert A. DeMarco
F. Woodward Lewis, Jr. in support of petition; Julie A. Manning in opposition

APPENDIX B

A.C. 16777

COMMERCIAL CREDIT CORP :APPELLATE COURT

V. :STATE OF CONNECTICUT

BEVERLY R. FORGIONE :APRIL 23, 1997

ORDER

THE MOTION OF THE PLAINTIFF, FILED FEBRUARY 19, 1997, TO DISMISS THE APPEAL OF THE DEFENDANT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED GRANTED

BY THE COURT,

s/

_____

ASSISTANT CLERK-APPELLATE

NOTICE SENT: 4/24/97
SHIPMAN & GOODWIN
F. WOODWARD LEWIS, JR.
ELLIOT ROSENBERG
CLERK, NEW HAVEN J.D. 0351035S
HON. DONALD W. CELOTTO
PAC
ROBERT A. DEMARCO

APPENDIX C

U.S. CONSTITUTION, AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the Unites States and subject to the jurisdiction thereof, are citizens of the Unites States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX D

CT RULES OF APPELLATE PROCEDURE

Sec. 4056 Motion to Dismiss

Any claim that an appeal or writ of error should be dismissed whether based on lack of jurisdiction, failure to file papers within the time allowed or other defect, shall be made by a motion to dismiss the appeal or writ. Any such motion must be filed in accordance with secs. 4041 and 4042 within ten days after the filing of the appeal or the return day of the writ, or if the ground alleged subsequently occurs, within ten days after it has arisen, provided that a motion based on lack of jurisdiction may be filed at any time. The court may on its own motion order than an appeal be dismissed for lack of jurisdiction.

Sec. 4064B - Page Limitation; Time for Filing

Except as otherwise ordered, the brief of the appellant shall not exceed thirty-five pages and shall be filed within forty-five days after the delivery date off the transcript ordered by the appellant, In cases where n transcript is required or the transcript has been received by the appellant prior to the filing of the appeal, the appellant's brief shall be filed within fortyfive days of the filing of the appeal.

Any party whose interest in the judgment will not be affected by the appeal and who intends not to file a brief shall inform the appellate clerk of this intent prior to the deadline for the filing of the appellee's brief. In the case of multiple appellees, an appellee who supports the position of the appellant shall meet the appellant's time schedule for filing a brief.

Except as otherwise ordered, the brief of the appellee shall not exceed thirty-five pages, and shall be filed within thirty days after the filing of the appellant's brief or the delivery date of the portions of the transcript ordered only by that appellee, whichever is later.

The appellant may within twenty days after the filing of the appellees brief file a reply brief which shall not exceed fifteen pages.

Where there is a cross appeal, the brief of the cross appellant shall be combined with the brief of the appellee and this brief shall not exceed fifty pages, and shall be filed at the time the appellee's brief is due. The brief of the cross appellee shall be combined with the appellant's reply brief, if any, and this brief shall not exceed forty pages and shall be filed within thirty days after the filing of the original appellee's brief. The cross appellant may within twenty days after the filing of the cross appellee's brief file a cross appellant's reply brief which shall not exceed fifteen pages.

Where cases are consolidated or a joint appeal has been filed, the brief of the appellants and that of the appellees shall not exceed the page limitations specified above.

All page limitations shall be exclusive of appendices, the statement of issues, the table of authorities, the table of contents, if any, and in the case of an amicus brief, the statement of the interest of the amicus curiae required by Sec. 4064f. The last page of a brief shall likewise not be counted if it contains only the signature of counsel of record.

Briefs shall not exceed the page limitations set forth herein except by permission of the chief justice or chief judge. Requests for permission to exceed the page limitations shall be made by letter, filed with the appellate

clerk, stating both the compelling reason for the request and the number of additional pages sought.

Where a claim relies on the state constitution as an independent ground for relief, the clerk shall, upon request by letter, grant an additional five pages for the appellant and appellee briefs, and an additional two pages for the reply brief, which pages are to be used for the state constitutional argument only.

Sec. 4106. Right to Oral Argument

(a) oral argument will be allowed as of right in all appeals except in civil cases where:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal argument are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) When the court determines that a civil case is appropriate for disposition without oral argument, or on an abbreviated time schedule, notice will be sent to counsel. Any party may request a hearing on the court's determination by letter addressed to the appellate clerk stating briefly the reasons why oral argument is appropriate, and shall do so within seven days of the issuance of the court's notice. The matter will be set down for a motion calendar at which time the parties may be heard briefly on whether oral argument should be allowed.

Sec. 4184B. Other Actions Subject to Sanctions

Actions which may result in the imposition of sanctions include but are not limited to, the following:

(1) Failure to comply with rules and orders of the court.

(2) Filing of any papers which unduly delay the progress of an appeal.

(3) Presentation of unnecessary or unwarranted motions or opposition to motions.

(4) Presentation of unnecessary or unwarranted issues on appeal.

(5) Presentation of a frivolous appeal or frivolous issues on appeal.

(6) Presentation of a frivolous defense or defenses on appeal.

(7) Failure to attend preargument settlement conferences.

(8) Disregard of rules governing withdrawal of appeals.

(9) Repeated failures to meet deadlines.

Offenders will be subject , at the discretion of the court, to appropriate discipline, including the prohibition against appearing in the court or filing any papers in the court for a reasonable and definite period of time, the imposition of aa fine pursuant to Gen Stat. §51-84, and costs and payment of expenses, together with attorney's fees to the opposing party.

The sanction of prohibition against filing any papers in the court shall not prevent an offender from filing a motion for reconsideration of that sanction within seven days.

Offenders subject to such discipline include both counsel and pro se parties and, if appropriate, parties

represented by counsel.

Sec. 4184C. Procedure on Sanctions

Sanctions my be imposed by the court, on its own motion, or on motion by any party to the appeal. A motion for sanctions may be filed at any time. A hearing at which any party may be heard shall be held before the imposition of any sanction.